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December 22, 1994

Dr. Robert M. Pepper, Chief
Mr. Donald H. Gips, Deputy Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Re: PP Docket No. 93-253 - Competitive Bidding
Request for Clarification of Commission's
Collusion Rules as Applied to Broadband PCS
Auction No. 4; Ex Parte Letter

Dear Dr. Pepper and Mr. Gips:

Cox Communications, Inc. ("Cox"), by its attorneys, hereby requests that the Federal Communications Commission (the "Commission") clarify the application of its anti-collusion rules for broadband Personal Communications Services ("PCS") to permit parties that have exhausted their ability to bid in the auctions to enter into consortia with other bidders who remain active auction participants. Providing unsuccessful bidders the opportunity for continued involvement in the bidding process will increase participation in the PCS auctions and provide additional capital for PCS investment, without increased risk of collusive or otherwise anti-competitive behavior.

In March 1994, the Commission adopted strict anti-collusion rules that prohibited all bidders from communicating on the substance of their bids or bidding strategies, or entering into consortia or joint bidding arrangements, between the filing of the short-form applications and the submission of down payments by auction participants.^{1/} In the Second Memorandum Opinion and Order released August 15, 1994, however, the Commission revised its anti-collusion rules to permit "useful" agreements among bidders that have no effect on the

^{1/} See Second Report and Order, Competitive Bidding, PP Docket No. 93-253 (adopted March 8, 1994, released April 20, 1994).

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competitiveness of the bidding process.^{2/} Specifically, the Commission modified its rules to permit bidders who have not filed short-form applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of the auction.^{3/} This action was intended to provide prospective licensees greater flexibility to modify their bidding strategies as the broadband auctions proceed, allowing parties the opportunity to respond to the dynamics of the auction process.

In effecting this change, the Commission did not address situations in which auction participants are no longer eligible to bid in the auctions because the values of their target licenses have risen far above their financial means or because they no longer have sufficient MHz-pops activity eligibility with which to bid. In these situations, the prospect of collusive activity is minimized in that party has participated in the competitive bidding process until it has made its independent judgment that it is no longer feasible to continue bidding. Cox submits that permitting bidders to communicate and enter into consortia after a particular participant is no longer capable of bidding and has formally withdrawn will result in more vigorous bidding, more varied participation in PCS and bids that more accurately reflect the licenses' true value.

On reconsideration of the Fifth Report and Order, released on October 19, 1994, the Commission declined to liberalize its rules to permit bidders who have applied to bid on the same licenses to communicate or enter into consortia, even if one of the bidders has withdrawn from the bidding process for the same market.^{4/} The rationale for this prohibition was that "undue pressure might be brought to bear on smaller bidders to withdraw in exchange for teaming up with other larger bidders, or sham applications might be filed to demand payment from other

2/ See Second Memorandum Opinion and Order, Competitive Bidding, PP Docket No. 93-253 (adopted August 12, 1994, released August 15, 1994).

3/ Such changes are treated as minor amendments to the short-form application, provided they do not result in a transfer of control of the license or the license applicant. See Second Memorandum and Order at ¶ 52.

4/ See Fourth Memorandum and Order, Competitive Bidding, PP Docket No. 93-253 (adopted October 19, 1994, released October 19, 1994).

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applicants." Although these concerns may be valid when bidders eligible to participate in the auctions simply withdraw to partner with other bidders, the Commission acknowledged that the prohibition stifles efficient bidding practices when the withdrawing bidder can no longer feasibly bid on its target licenses. In these instances, permitting former bidders to invest capital in, or otherwise become involved with, current bidders will enhance the success of the bidding process.

In the on-going broadband PCS MTA auctions, there are few if any "small" bidders and none are subject to "pressure" to withdraw by larger bidders. The companies that have withdrawn (or which subsequently may withdraw) have done so after making an economic determination that they can no longer afford to bid on their target licenses. Permitting discussions or entering agreements between these parties and current bidders presents no greater opportunity for collusion than discussions between current bidders and entities not participating in the auction process or auction participants bidding in different markets. Indeed, if withdrawing parties entering new agreements certify that there have been no pre-filing agreements or "pay-offs" prior to their withdrawal, no issue of anti-competitive collusion should arise.

Commission Policy Supports a Clarification of the Rule

Since adopting the initial anti-collusion rule in March 1994, the Commission consistently has liberalized the rule to reflect the fact that bidders require flexibility to react to auction developments and to reflect an increasingly sophisticated understanding of the potential for collusion. For instance, as discussed above, the Commission modified its restrictions on bidder communications during the auction to prohibit discussions only between bidders vying for the same licenses. In November 1994, the Commission modified the rules to permit holders of non-controlling attributable interests in one applicant for a particular license to form consortia or enter into joint bidding arrangements with applicants for licenses in the same market, provided that appropriate certifications are submitted.^{5/} In

5/ See Memorandum Opinion and Order, Competitive Bidding, PP Docket No. 93-253 (Adopted November 16, 1994, released November 17, 1994); see also Letter from Rosalind K. Allen, Acting Chief, Commercial Radio Division, Wireless Telecommunications Bureau to
(continued...)

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each instance, the Commission emphasized the deterrent effect of the antitrust laws in curbing collusive behavior. Cox urges the Commission to adopt the same flexible approach in applying its collusion rules to parties which have withdrawn from bidding on particular licenses after having determined they no longer can compete for their target licenses.

Cox requests that the Commission clarify that bidders that have formally withdrawn from bidding on particular licenses (and have no remaining MHz-pops eligibility) may hold discussions and enter arrangements with current bidders after having determined that it is no longer financially feasible for them to continue bidding independently. Any lingering concern regarding collusive behavior is adequately addressed under the antitrust laws. The prohibition against contact between bidders on the same licenses prior to withdrawal prevents communications between active bidders. As provided by the Commission's Rules, any violation of these restrictions will result in substantial penalties, including possible license revocation and ineligibility to bid in future auctions.

Accordingly, Cox requests that the Commission permit bidders that have withdrawn from participation on particular licenses to hold discussions and join consortia with bidders in the same markets, provided they have (1) formally withdrawn from bidding on specific licenses within those markets; and (2) certified that they are no longer eligible to bid on the licenses and have not discussed any aspects of the competitive bidding

5/ (...continued)


Leonard J. Kennedy (dated December 14, 1994) (clarifying that a consortium may negotiate private agreements with its members to assign interests in particular licenses to individual consortium members as long as the antitrust laws are not contravened).

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process with other bidders for the same licenses subsequent to the filing of their short-form applications and prior to their withdrawal from the auction and filing of such certification.

Respectfully submitted,

COX COMMUNICATIONS, INC.


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Its Attorneys

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